FILED
DEC 23 1997
CLERK

(2)

No. 97-864

In The

Supreme Court of the United States

October Term, 1997

AVAINE STRONG,

Petitioner,

v.

STATE BOARD FOR TECHNICAL AND COMPREHENSIVE EDUCATION; Denmark Technical College Area Commission; Frankie Keels, and State of South Carolina Human Affairs Commission; Denmark Technical College,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF REPONDENTS IN OPPOSTION

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT EXERCISE CERTIORARI JURISDICTION TO REVIEW ISSUES PRESENTED BY THE PETITIONER WHERE HE HAS FAILED TO ALLEGE APPROPRIATE BASES FOR THIS COURT'S EXERCISE OF DISCRETIONARY REVIEW UNDER SUPREME COURT RULE 10?

II. SHOULD THIS COURT EXERCISE CERTIORARI JURISDICTION TO DETERMINE ISSUES WHICH WERE NOT PROPERLY PRESERVED FOR APPEAL?

III. SHOULD THIS COURT EXERCISE CERTIORARI JURISDICTION TO INTERPRET SOUTH CAROLINA CONSPIRACY LAW WHERE THE FOURTH CIRCUIT CORRECTLY INTERPRETED SUCH LAW?

IV. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW THE REFUSAL OF THE FOURTH CIRCUIT TO ORDER A GRAND JURY INVESTIGATION WHERE SUCH ACTION IS BEYOND THE JURISDICTION OF THE UNITED STATES COURTS OF APPEAL?

V. SHOULD THIS COURT GRANT CERTIORARI TO DECIDE ISSUES WHICH WERE NOT THE BASIS FOR THE DECISION BELOW?

VI. SHOULD THIS COURT GRANT CERTIORARI TO DETERMINE IF REMOVAL WAS PROPER WHERE THE CASE HAS BEEN FULLY LITIGATED ON THE MERITS AND APPEALED TO THE FOURTH CIRCUIT?

QUESTIONS PRESENTED FOR REVIEW – Continued

VII. SHOULD THIS COURT GRANT CERTIORARI WHERE THE FOURTH CIRCUIT PROPERLY DENIED PETITIONER'S REQUEST FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC?

VIII. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW THE FORM AND CONTENT OF THE FOURTH CIRCUIT'S DISPOSITION OF THIS CASE IN AN UNPUBLISHED PER CURIAM OPINION?

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STATEMENT OF THE CASE

Petitioner, a former professor and administrator at Denmark Technical College (hereinafter "DTC"), originally brought this action, *pro se*, against the above Respondents after voluntarily resigning his position on July 29, 1993. On September 14, 1992, almost a year before his resignation, Appellant was removed from his position as Dean of Engineering and Industrial Technology for poor job performance. He remained at DTC as a full-time faculty member. On April 14, 1993, Petitioner filed a charge of discrimination with the South Carolina Human Affairs Commission (hereinafter "SHAC")[1], which ultimately issued a determination of "no reasonable cause." Petitioner then sued for slander, violation of civil rights, sexual harassment (Title VII), defamation, intentional infliction of emotional distress, unfair and deceptive business practices, and conspiracy.

On November 7, 1994, Respondents filed a Motion to Dismiss SHAC from this case, based on the doctrine of sovereign immunity. During a hearing on the Motion in December, 1994, Appellant agreed to withdraw his Complaint against SHAC. Petitioner later forwarded a letter to the court explaining that he had changed his position and wished to seek a declaratory judgment against SHAC. Respondents' counsel forwarded a letter to the court on January 6, 1995, requesting that Appellant be required to amend his Complaint to seek a declaratory judgment. On

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[1] The South Carolina General Assembly created the South Carolina Human Affairs Commission to investigate claims of discrimination in South Carolina, a deferral state. *See* S.C. Code Ann. § 1-13-10 *et seq.*

January 10, 1995, Petitioner forwarded another letter to the court agreeing to amend his Complaint. Petitioner, however, never properly amended his Complaint.

On March 15, 1995, Respondents moved for summary judgment. The trial judge granted Respondents' Motion with respect to all Respondents on the claims of slander, violation of civil rights, defamation, intentional infliction of emotional distress, unfair and deceptive business practices, and conspiracy. The Motion was denied only with respect to Petitioner's claim of sexual harassment. This case was tried before a jury from October 30 through November 1, 1995, with United States Magistrate Judge Robert Carr presiding. During this trial, Petitioner called at least seven witnesses. Moreover, he cross-examined Respondents' witnesses at length. After deliberation, the jury rendered a verdict for Respondents.

On November 30, 1995, Petitioner filed a Notice of Appeal in the United States District Court for the District of South Carolina. The appeal was held in the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the District Court's decision without hearing oral arguments by an unpublished *per curiam* opinion on July 21, 1997. The Fourth Circuit affirmed the grant of summary judgment against the Petitioner on his conspiracy claim and held that all other issues raised on appeal were either inappropriate for appellate review or were not properly preserved for appeal. On July 31, 1997, Petitioner filed a Petition for Rehearing with Suggestion for Rehearing in banc. The Petition was denied on August 26, 1997.

REASONS FOR DENYING CERTIORARI

I. Petitioner Has Failed To Allege Appropriate Bases For This Court's Exercise of Discretionary Review

Petitioner presents factual issues which are inappropriate for certiorari to the Supreme Court of the United States. Supreme Court Rule 10 provides guidance for determining what questions are appropriate for certiorari. Relevant portions of the Rule describe situations in which this Court may grant certiorari:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decide an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. None of the twenty-five questions Petitioner presents for review even remotely fall within the guidelines for granting certiorari as set forth in Rule 10. Furthermore, none of Petitioner's questions presented raise the issue of an interpretation of federal law. *See Braxton v. United States*, 500 U.S. 344 (1991) (holding that the principal purpose of certiorari jurisdiction is to

resolve conflicts among Circuit Courts of Appeals and state courts concerning interpretation of federal law). Instead, all of the issues presented for review to this Court are factual and evidentiary objections which either were not addressed in the proceedings below or were not properly preserved for appeal.

Petitioner has raised myriad factual and procedural issues before this Court which are not appropriate for certiorari. Petitioner mistakenly treats this Court's review as an appeal of right. As recognized by the late Chief Justice Taft, certiorari "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Certiorari is not to be granted to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Many of the questions presented by the Petitioner concern evidentiary and factual objections which either were not raised before the Fourth Circuit or were not properly preserved below.

While it is Respondents' position that none of the twenty-five questions presented by the Petitioner for review qualify for certiorari review under Supreme Court Rule 10, Respondents will briefly address the appealability of those issues.

II. Issues Submitted to This Court by Petitioner Were Not Properly Preserved for Appeal in the Lower Courts

Petitioner now seeks review of questions the Fourth Circuit declined to review, because the Petitioner had

failed to properly preserve the issues for appeal. Ordinarily, this Court will not decide questions which were not raised or litigated below. *City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, *reh'g denied,* 481 U.S. 1033 (1987). Specifically, the Petitioner challenges the making of inappropriate statements in the presence of the jury, the exclusion of Petitioner's hearsay evidence by the trial judge, the treatment of the Petitioner as a *pro se* litigant by the trial judge, the trial judge's denial of *voir dire* questions regarding race and religion, the trial judge not instructing all defendants to sit at defendant's table during trial, the use of a particular defense by the Respondents, and the district court's denial of Petitioner's equal protection rights. Appellant has failed to properly preserve these issues as required by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. *See, e.g.,* Fed. R. Evid. 103; Fed. R. Civ. P. 50 and 51. Because Petitioner failed to object to any of these issues at trial, the Fourth Circuit properly refused to revisit them on appeal. Therefore, for the same reasons this Court should also decline certiorari to review them.

III. The Fourth Circuit Correctly Interpreted South Carolina Conspiracy Law on Petitioner's Appeal of the Grant of Summary Judgment in Favor of Respondents

Addressing Petitioner's conspiracy claim on the merits, the Fourth Circuit correctly interpreted South Carolina law in holding that the summary judgment was proper. *See Todd v. South Carolina Farm Mutual Ins. Co.,* 278 S.E.2d 607 (S.C. 1981) (holding that where conspiracy allegations merely restate acts encompassed in other

claims, the conspiracy claim fails as a matter of law). Therefore, this Court should decline certiorari on this issue.

IV. Petitioner's Suggestion That This Court Review the Fourth Circuit's Denial of His Request for a Grand Jury Investigation Is Not Properly Before This Court

Petitioner's request for this Court to review the Fourth Circuit's denial of his request for a Grand Jury investigation of SHAC's handling of his claims of discrimination is not properly before this Court. Such action is beyond the jurisdiction of the federal circuit courts of appeal. The jurisdiction of the Fourth Circuit is limited to review of final decisions and interlocutory orders of district courts. 28 U.S.C. §§ 1291 & 1292. It does not extend to ordering Grand Jury investigations. *Id.* Because the Fourth Circuit did not err in denying Petitioner's request for a Grand Jury investigation, this Court should decline certiorari to hear the issue.

V. Petitioner Improperly Raises Questions in His Petition for Certiorari Which Were Not Decided Below

Petitioner has raised several new issues in his Petition for Certiorari which are not properly before this Court. This Court "generally do[es] not address arguments that were not the basis for the decision below." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, n.7 (1996) (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, n.5 (1996)); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)

(failing to raise issue of denial of request to amend complaint before the court of appeals precluded consideration of the issue upon petition for certiorari).

Petitioner presents numerous issues to this Court which were not brought before the Fourth Circuit. They include: (1) whether SHAC violated "federal laws in reaching its decision of 'no reasonable cause;' " (2) whether Petitioner was provided equal protection during SHAC's investigation; (3) whether the district court erred in dismissing Petitioner's due process and freedom of speech claim; (4) whether the district court erred in not allowing Petitioner to amend his complaint; (5) whether Petitioner as a *pro se* litigant was held to the same standards as lawyers; (6) whether Petitioner's claims of sexual harassment were given equal weight as claims by his female counterparts; (7) whether the trial judge erred when choosing not to intervene in settlement; (8) whether the district court violated Petitioner's equal protection rights; (9) whether the trial judge erred by not allowing questions regarding race and religion to be included in the *voir dire* questions for the jury; (10) whether the trial judge erred by not instructing Respondents to sit at their table during trial; (11) whether sequestration of witnesses provided the Respondents with an unfair advantage at trial; and (12) whether the trial judge erred when he allowed Respondent to offer a particular defense.

Petitioner should have been aware of these issues before appeal; however, he failed to raise any of these issues before the Fourth Circuit. As none of these issues were addressed below, this Court should decline certiorari to review these issues. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

VI. Petitioner's Challenge That Removal was Improper is not Appropriate for Review on Certiorari

Petitioner also challenges removal of the case to the district court. However, removal was proper in this case because the action was brought under Title VII of the Civil Rights Act of 1964 and could have been brought under the district court's original jurisdiction pursuant to 28 U.S.C. § 1331. Therefore, the case was properly removed pursuant to 28 U.S.C. § 1441. Because removal was proper in this case, the issue is not appropriate for certiorari review.

Even if removal had been improper, Petitioner has waived his objection to federal court jurisdiction by permitting the case to be tried on the merits in federal district court and appealing to the Fourth Circuit. *See Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs., Inc.*, 903 F.2d 352 (5th Cir. 1990) (applying factors outlined in *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972), to hold that, where removal was improper and summary judgment was granted, remand was precluded because the case had been determined on the merits). The Fifth Circuit further noted that the *Grubbs* rule spawns from "concerns for judicial economy and from a desire to prevent a party that bided its time before raising a defect in removal jurisdiction from getting a second bite at the apple." *Id.* at 359. Removal of this case was proper, and even if it were not, remanding the case to state court would be improvident. At this stage, remand would contravene the noted concern for judicial economy enunciated in *Grubbs*.

VII. The Fourth Circuit Properly Denied Petitioner's Petition for Rehearing With Suggestion for Rehearing In Banc

Petitioner also petitions this Court to review the denial of his Petition for Rehearing with Suggestion for Rehearing In Banc by the Fourth Circuit. The purpose of a petition for rehearing is to direct the court's attention to some material matter of law or fact which it overlooked when deciding a case which, had it been given consideration, would probably have brought about a different result. *NLRB v. Brown & Root, Inc.*, 206 F.2d 73 (8th Cir. 1953). In his Petition for Rehearing with Suggestion for Rehearing In Banc, Petitioner raised many of the same issues presented in his Petition for Certiorari to this Court. Specifically, Petitioner challenged the Fourth Circuit's determination that those issues were not properly preserved for appeal. The Fourth Circuit correctly denied rehearing on the basis that Petitioner had failed to properly preserve those issues for appeal in the trial court.

The Fourth Circuit's denial of Petitioner's request for rehearing in banc was proper. Federal Rules of Appellate Procedure Rule 35 provides:

> [rehearing in banc] is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35. Petitioner has failed to allege that his case falls under the requirements of the Rule 35. Instead of presenting a question of "exceptional importance," Petitioner presented to the Fourth Circuit factual and

procedural issues of only trivial importance. Although Petitioner proceeded *pro se* at trial, he is intelligent and well educated. He has advanced degrees in Physics and Mathematics. As demonstrated by his numerous motions and memoranda, he was aware of many of the procedural requirements of the Federal Rules. In banc considerations are appropriate in extremely unusual cases where necessary to cure a gross injustice. *United States v. Lynch*, 690 F.2d 213 (D.C. Cir. 1982). The Fourth Circuit properly declined in banc review because no such "gross injustice" existed in its decision. Therefore, this Court should deny certiorari to review the decision of the Fourth Circuit to decline the Petition for Rehearing with Suggestion for Rehearing In Banc.

VIII. Certiorari is Not Proper to Address Petitioner's Objection to the Form and Content of the Fourth Circuit's Unpublished Per Curiam Opinion

Certiorari is not proper to review Petitioner's allegation that the Fourth Circuit erred by providing an opinion only on those issues briefed by the Respondents. The Fourth Circuit issued an unpublished *per curiam* opinion on July 21, 1997. The court held that all of Petitioner's issues for appeal "fail[ed] to clarify how [Petitioner] was prejudiced" and that those issues were not properly preserved for appeal. *Strong v. State Board for Tech. & Comp. Educ.*, 117 F.3d 1414, *1414 (4th Cir. 1997) (unpublished *per curiam* opinion). The standard of review on a writ of certiorari is harmless error. 28 U.S.C. § 2111. Harmless error is that which does not affect substantial rights. *Helms v. United States*, 340 F.2d 15 (5th Cir. 1964), *cert. denied*, 382 U.S. 814 (1965). Because Petitioner has failed

to demonstrate that he was substantially prejudiced by the alleged failure of the Fourth Circuit to individually address each issue at length which was raised in his appellate brief, this Court should deny certiorari.

CONCLUSION

Because Petitioner has failed to allege issues which are proper for certiorari by this Court, Respondents request this Court deny Petitioner's request for certiorari.

Respectfully Submitted,

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